In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 418

THE STUYVESANT INSURANCE COMPANY,
SURETY ON BOND FOR ALBERT AGUECI,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. II) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1967. The petition was filed on July 25,

1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district judge abused his discretion in refusing to set aside the forfeiture of a bail bond.

RULE INVOLVED

Rule 46(f) of the Federal Rules of Criminal Procedure provides in part:

> (f) Forfeiture.
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> * * * *
>
> (2) **Setting Aside.** The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

STATEMENT

Albert Agueci was indicted in the United States District Court for the Southern District of New York for conspiracy to violate the narcotics laws. On September 11, 1961, after bail had been reduced from $30,000 to $20,000, petitioner issued a bail bond for Agueci who was to appear in court on October 9, 1961. Agueci failed to appear and the bond was forfeited (Pet. 2-3). On November 23, 1961, Agueci's burned body was found in upstate New York. In June 1965 a motion to set aside the forfeiture was denied. Thereafter, petitioner obtained the medical records of the Monroe County (N.Y.) Medical Ex-

aminer and again moved to set aside the forfeiture (Pet. App. I, at 12-13). The matter came on for hearing before Judge Herlands on June 27, 1966. The medical testimony was that the earliest possible date of death was two weeks prior to the discovery of the body on November 23, 1961 (R. 34a-36a).[1] The Monroe County Medical Examiner testified that Agueci died as a result of strangulation and that his hands had been wired prior to the burning (R. 11a). Mrs. Agueci and her daughter testified that Albert Augeci had left home on October 8, 1961 with the announced intention of going to New York to appear in court (R. 15a-17a, 19a-21a). Neither the Aguecis nor the petitioner offered any evidence relating to their attempts to locate Albert Agueci when he did not appear for trial. An affidavit of a neighbor, Frank Cutrona, stated that he would suffer hardship if the bond were forfeited, since he had placed a mortgage on his home in connection with the arrangements for the security (R. 2a-5a). Judge Herlands refused to set aside the forfeiture. In his memorandum opinion he expressed the view that, despite the hardship this would cause to the Cutronas and the Aguecis, the public interest required forfeiture since the purpose of a bond is to insure a defendant's appearance in court. He found nothing to indicate that Agueci's non-appearance in court on October 9 was involuntary and he did not credit the

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[1] "R." refers to the record on file with the Clerk of this Court, the pagination being that of the appellant's appendix in the court of appeals.

testimony of Mr. Agueci and her daughter as to Agueci's announced intention when he left home on October 8. He noted that the evidence at the trial showed Agueci to have played an important role in a major international narcotics ring. In the circumstances he found that public interest warranted the forfeiture of the bond for the deliberate default (Pet. App. I). The court of appeals affirmed the decision of the district court (Pet. App. II).

ARGUMENT

There is no occasion to review the exercise of discretion by the courts below. No evidence was offered to support the argument that Albert Agueci was prevented from appearing by an independent force. Agueci's death occurred, at the earliest, one month after he was to have appeared in court and does not support an inference that he was kidnapped prior to the hearing. Although Judge Herlands conceded that hardship would result to innocent persons as a result of Albert Agueci's non-appearance, he concluded that the interest of the public in assuring the appearance of an accused in court overrides the considerations of private hardship. That determination, we believe, was a permissible exercise of the court's discretion.[2] See *Bennett* v. *United States*, 360 F.2d 7 (C.A. 8);

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[2] It is, of course, common practice for sureties to require collateral for the issuance of a bond, for which a defendant must often rely on his family and friends. Thus, in many forfeiture cases, it is "innocent" persons who lose by the defendant's default.

Smith v. *United States*, 357 F.2d 486 (C.A. 5). Moreover, as Judge Herlands noted, Stuyvesant "did not offer any testimony concerning its efforts at any time on or after October 9, 1961 to locate the defendant or to ascertain the cause for his non-appearance" (Pet. App. I, at 13). In short, it did not even attempt to show that it had performed any of its proper functions.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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